



## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[REG-122286-18]

RIN 1545-BO98

#### Use of Forfeitures in Qualified Retirement Plans

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document sets forth proposed regulations that would provide rules relating to the use of forfeitures in qualified retirement plans, including a deadline for the use of forfeitures in defined contribution plans. These proposed regulations would affect participants in, beneficiaries of, administrators of, and sponsors of qualified retirement plans.

**DATES:** Written or electronic comments must be received by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at [www.regulations.gov](https://www.regulations.gov) (indicate IRS and REG-122286-18) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish to the IRS's public docket, for public availability, any comments submitted, whether electronically or on paper. Send paper submissions to: CC:PA:LPD:PR (REG-122286-18), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, call Brandon M. Ford or Joyce I. Kahn at (202) 317-4148; concerning submission of comments and requests for a public hearing, call Vivian Hayes at (202) 317-5306 (not toll-free numbers) or email [publichearings@irs.gov](mailto:publichearings@irs.gov).

## **SUPPLEMENTARY INFORMATION:**

### **Background**

#### General Forfeiture Rules for Qualified Plans

Section 401(a)(7) of the Internal Revenue Code (Code) provides that a trust forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of its employees or their beneficiaries will not constitute a qualified trust under section 401(a) unless its related stock bonus, pension, or profit-sharing plan satisfies the requirements of section 411 (relating to minimum vesting standards).<sup>1</sup>

Section 411(a) generally provides that an employee's right to accrued benefits derived from employer contributions must become nonforfeitable after a specified period of service. Section 411(a) also provides exceptions to this general rule under which an employee's benefit is permitted to be forfeited without violating section 411, conditions under which forfeited amounts must be restored upon a participant's repayment of a withdrawal, and other rules related to vesting.

Section 2(2) of the Self-Employed Individuals Tax Retirement Act of 1962, Pub. L. No. 87-792, 76 Stat. 809, added section 401(a)(8) of the Code, providing that a trust forming part of a pension plan will not constitute a qualified trust under section 401(a) unless the plan provides that forfeitures must not be applied to increase the benefits any employee would otherwise receive under the plan.

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<sup>1</sup> There are parallel vesting requirements in section 203 of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (ERISA). The IRS has interpretive authority over that section pursuant to Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1, 92 Stat. 3790. (Reorganization Plan No. 4).

Section 1.401-7(a), promulgated in 1963, generally provides, in the case of a trust forming a part of a qualified pension plan, that the plan must expressly provide that forfeitures arising from severance of employment, from death, or for any other reason may not be applied to increase the benefits any employee would otherwise receive under the plan at any time prior to the termination of the plan or the complete discontinuance of employer contributions under the plan, and that the amounts so forfeited must be used as soon as possible to reduce the employer's contributions under the plan. Section 1.401-7(a) also provides that a qualified pension plan may anticipate the effect of forfeitures in determining costs under the plan, and that a qualified plan will not be disqualified merely because a determination of the amount of forfeitures under the plan is made only once during each taxable year of the employer.

Section 1.401-1(b)(1)(i) provides that a pension plan is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to employees over a period of years, usually for life, after retirement. Section 1.401-1(b)(1)(i) further provides that benefits under a pension plan are not definitely determinable if funds arising from forfeitures on termination of service, or other reason, may be used to provide increased benefits for the remaining participants. Section 1.401-1(b)(1)(i) specifically refers to § 1.401-7, relating to the treatment of forfeitures under a qualified pension plan, in setting forth the requirement that forfeitures not be used to provide increased benefits for participants.

Section 1119(a) of the Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085 (TRA 86), amended section 401(a)(8) of the Code to replace the term "pension plan" (which includes a defined contribution money purchase pension plan) with the term "defined benefit plan" (which does not include a money purchase pension plan). The conference report accompanying TRA 86 (Conference Report) explained that, prior to TRA 86, forfeitures under a money purchase pension plan could not be used to

increase benefits, but were required to be applied to reduce future employer contributions or to offset administrative expenses of the plan, and that forfeitures in a defined contribution plan that is not a money purchase pension plan could be reallocated to the remaining participants under a nondiscriminatory formula, used to reduce future employer contributions, or used to offset administrative expenses of the plan. H.R. Rept. No. 99-841, at II-442 (1986). The Conference Report also noted that the changes made by TRA 86 provided uniform rules regarding the use of forfeitures under any defined contribution plan and stated that, following these changes, “forfeitures arising in any defined contribution plan (including a money purchase pension plan) can be either (1) reallocated to the accounts of other participants in a nondiscriminatory fashion, or (2) used to reduce future employer contributions or administrative costs.” Id.

#### Forfeitures in Defined Contribution Plans

Section 414(i) provides that a defined contribution plan is a plan that provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant’s account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to the participant’s account.

Section 1.401-1(b)(1) provides rules related to specific types of qualified retirement plans. Section 1.401-1(b)(1)(i) provides that a pension plan (including a money purchase pension plan) is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits and that a plan will be considered a pension plan if employer contributions can be determined actuarially on the basis of definitely determinable benefits, or, as in the case of money purchase pension plans, such contributions are fixed without being geared to profits. Section 1.401-1(b)(1)(ii) provides that a profit-sharing plan must provide a

definite predetermined formula for allocating the contributions made to the plan among the participants and for distributing the funds accumulated under the plan. Section 1.401-1(b)(1)(iii) applies similar requirements to a stock bonus plan.

Rev. Rul. 80-155, 1980-1 CB 84, provides that profit-sharing plans, stock bonus plans, and money purchase pension plans are required to provide for distributions in accordance with amounts stated or ascertainable and credited to participants. The revenue ruling further provides that amounts that are to be allocated or distributed to a particular participant are ascertainable only if the plan provides for a valuation at least annually.

A 2010 Newsletter of the Employee Plans office of the IRS's Tax Exempt and Government Entities Division (*Retirement News for Employers*, Vol. 7, Spring 2010) (the 2010 Newsletter)<sup>2</sup> noted that some defined contribution plan administrators place forfeited amounts into a plan suspense account, allowing them to accumulate over several years, but that the Code does not allow this practice. It advised that a plan document should have provisions detailing how and when a plan will use or allocate plan forfeitures, and it described deadlines for the use or allocation of forfeitures.<sup>3</sup>

#### Forfeitures in Defined Benefit Plans

As originally enacted, section 401(a)(8) provided that a trust forming part of a pension plan will not constitute a qualified trust under section 401(a) unless the plan provides that forfeitures must not be applied to increase the benefits any employee would otherwise receive under the plan. As noted in the section of this preamble titled "General Forfeiture Rules for Qualified Plans," section 1119(a) of TRA 86 amended section 401(a)(8) of the Code to replace the term "pension plan" with the term "defined

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<sup>2</sup> [www.irs.gov/pub/irs-pdf/p4278.pdf](http://www.irs.gov/pub/irs-pdf/p4278.pdf).

<sup>3</sup> In particular, the newsletter advised that generally "[n]o forfeitures in a suspense account should remain unallocated beyond the end of the plan year in which they occurred," and that "[f]or those plans that use forfeitures to reduce plan expenses or employer contributions, there should be plan language and administrative procedures to ensure that current year forfeitures will be used up promptly in the year in which they occurred or in appropriate situations no later than the immediately succeeding plan year."

benefit plan,” with the result that defined benefit plans continue to be subject to the rule that forfeitures may not be used to increase benefits.

The use of forfeitures in defined benefit plans has also changed since the issuance in 1963 of § 1.401-7 (which provides that amounts forfeited in pension plans must be used as soon as possible to reduce employer contributions), due to the enactment of new minimum funding requirements applicable to defined benefit plans. For example, in 1974 ERISA added section 412 to the Code, which requires qualified defined benefit plans (and certain qualified defined contribution plans) to satisfy a minimum funding standard.<sup>4</sup> Subsequently, the minimum funding standards have been modified to provide differing standards for different types of plans. See sections 430, 431, and 433.

None of the provisions that set forth minimum funding requirements for qualified defined benefit plans allow required contributions to be offset by forfeitures of accrued benefits. Instead, all of these provisions require the use of reasonable actuarial assumptions to determine the effect of expected forfeitures on plan liabilities. See sections 430(h), 431(c)(3), and 433(c)(3). Any difference between actual forfeitures and expected forfeitures is reflected in future contributions required under section 412 pursuant to the funding method used for the plan under section 430, 431, or 433.

## **Explanation of Provisions**

### **Use of Forfeitures in Defined Contribution Plans**

Consistent with changes made by TRA 86 providing uniform rules for the use of forfeitures in defined contribution plans (as described in the Conference Report), the proposed regulations would clarify that forfeitures arising in any defined contribution plan (including in a money purchase pension plan) may be used for one or more of the

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<sup>4</sup> Section 302 of title I of ERISA sets forth minimum funding standards that are parallel to the minimum funding standards in section 412 of the Code. The IRS has interpretive authority over section 302 of title I of ERISA pursuant to Reorganization Plan No. 4.

following purposes, as specified in the plan: (1) to pay plan administrative expenses, (2) to reduce employer contributions under the plan, or (3) to increase benefits in other participants' accounts in accordance with plan terms.<sup>5</sup> The use of forfeitures to reduce employer contributions includes the restoration of inadvertent benefit overpayments and the restoration of conditionally forfeited participant accounts that might otherwise require additional employer contributions, for example, the restoration of accounts conditionally forfeited under § 1.411(a)-7(d) (relating to certain distributions and cash-outs of accrued benefits).

#### Timing for Use of Forfeitures in a Defined Contribution Plan

The proposed regulations would generally require that plan administrators use forfeitures no later than 12 months after the close of the plan year in which the forfeitures are incurred. This deadline is intended to simplify administration by providing a single deadline for the use of forfeitures that applies for all types of defined contribution plans and to alleviate administrative burdens that may arise in using or allocating forfeitures if forfeitures are incurred late in a plan year. The deadline in the proposed regulations is similar to the deadline under § 1.401(k)-2(b)(2)(v) for a section 401(k) plan to correct excess contributions by making corrective distributions, which is 12 months after the close of the plan year in which the excess contributions arise. The proposed regulations would not affect generally applicable deadlines related to the timing of contributions and allocations under a plan, such as the deadline for correcting excess contributions to avoid excise taxes under section 4979 as set forth in § 1.401(k)-2(b)(5)(i).

The proposed regulations provide a transition rule related to the 12-month deadline. Under this rule, forfeitures incurred during any plan year that begins before

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<sup>5</sup> Additionally, under section 6001, plan administrators must keep records necessary to demonstrate compliance with the qualification requirements of section 401(a), including records related to the use of forfeitures.

January 1, 2024, are treated as having been incurred in the first plan year that begins on or after January 1, 2024; accordingly, those forfeitures must be used no later than 12 months after the end of that first plan year. As described in the section of this preamble titled “Proposed Applicability Date,” these regulations are proposed to apply for plan years beginning on or after January 1, 2024.

Although nothing in the proposed regulations would preclude a plan document from specifying only one use for forfeitures, the plan may fail operationally if forfeitures in a given year exceed the amount that may be used for that one purpose. For example, if (1) a plan provides that forfeitures may be used solely to offset plan administrative expenses, (2) plan participants incur \$25,000 of forfeitures in a plan year, and (3) the plan incurs only \$10,000 in plan administrative expenses before the end of the 12-month period following the end of that plan year, there will be \$15,000 of forfeitures that remain unused after the deadline established in these proposed regulations. Thus, the plan would incur an operational qualification failure because forfeitures remain unused at the end of the 12-month period following the end of that plan year. The plan could avoid this failure if it were amended to permit forfeitures to be used for more than one purpose.

#### Use of Forfeitures in Defined Benefit Plans

The proposed regulations would update rules relating to the use of forfeitures in defined benefit plans to reflect the enactment, after the issuance of § 1.401-7, of new minimum funding requirements applicable to defined benefit plans. In addition, the requirement in existing § 1.401-7(a) that forfeitures under pension plans be used as soon as possible to reduce employer contributions would be eliminated because it is inconsistent with those minimum funding requirements. The minimum funding requirements of sections 412, 430, 431, and 433 do not allow the use of forfeitures to reduce required employer contributions to a defined benefit plan in the manner



contemplated by existing § 1.401-7. Instead, reasonable actuarial assumptions are used to determine the effect of expected forfeitures on the present value of plan liabilities under the plan's funding method. Differences between actual forfeitures and expected forfeitures will increase or decrease the plan's minimum funding requirement for future years pursuant to the plan's funding method.

### **Proposed Applicability Date**

These regulations are proposed to apply for plan years beginning on or after January 1, 2024. Thus, for example, the deadline for the use of defined contribution plan forfeitures incurred in a plan year beginning during 2024 will be 12 months after the end of that plan year. Taxpayers, however, may rely on these proposed regulations for periods preceding the applicability date.

### **Special Analyses**

These proposed regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

It is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6). The Treasury Department and the IRS understand that (1) plans typically provide for the use of (and use) forfeitures in a manner consistent with the proposed regulations and (2) defined contribution plans typically use forfeitures by the deadline set forth in the proposed regulations (consistent with the 2010 Newsletter). Accordingly, for most plans, the proposed regulations are not expected to require changes to plan terms or plan operations, or otherwise have a significant economic impact on plans or plan sponsors. If any plans have terms or operations that are inconsistent with the proposed regulations, it is not expected that these proposed

regulations will have a significant economic impact on those plans or the sponsors of those plans. For example, the proposed regulations do not require any additional employer contributions or impose burdensome operational requirements.

Notwithstanding this certification that the proposed regulations would not have a significant economic impact on a substantial number of small entities, the Treasury Department and the IRS invite comments on the impacts these proposed regulations may have on small entities. Pursuant to section 7805(f), these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### **Comments and Requests for Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the Treasury Department and the IRS as prescribed in this preamble under the “ADDRESSES” heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. Specifically, comments are requested on the following topics:

- Whether the rules for the use of forfeitures in defined benefit and defined contribution plans can be further simplified to reduce administrative costs and burdens; and
- Whether any issues arise concerning other unallocated amounts (in addition to forfeitures) with respect to qualified retirement plans, and, if issues do arise, whether guidance should be provided addressing those issues.

All comments will be available for public inspection and copying at [www.regulations.gov](http://www.regulations.gov) or upon request. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the public hearing will be published in the *Federal Register*.

### **Drafting Information**

The principal author of these proposed regulations is Brandon Ford, Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the Treasury Department and the IRS participated in the development of these regulations.

## **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

## **Proposed Amendments to the Regulations**

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

### **PART 1—INCOME TAXES**

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

#### **§ 1.401-1 [Amended]**

Par. 2. Section 1.401-1 is amended by removing the fourth sentence of paragraph (b)(1)(i).

Par. 3. Section 1.401-7 is revised to read as follows:

#### **§ 1.401-7 Forfeitures under a qualified retirement plan.**

(a) *Forfeitures under a qualified defined benefit plan.* In the case of a trust forming a part of a qualified defined benefit plan (as described in section 414(j)), the plan must expressly provide that forfeitures may not be applied to increase the benefits any employee would otherwise receive under the plan at any time prior to the termination of the plan or the complete discontinuance of employer contributions thereunder. However, the effect of forfeitures may be anticipated in determining the costs under the plan. See sections 430(h)(1), 431(c)(3), and 433(c)(3), as applicable, regarding the use of reasonable actuarial assumptions in determining the amount of contributions required to be made under a plan to which one of those sections applies.

(b) *Forfeitures under a qualified defined contribution plan.* In the case of a trust forming a part of a qualified defined contribution plan (as described in section 414(i)) that provides for forfeitures, the plan must provide that:

(1) Forfeitures will be used for one or more of the following purposes:

(i) To pay plan administrative expenses;

(ii) To reduce employer contributions under the plan; or

(iii) To increase benefits in other participants' accounts in accordance with plan terms; and

(2) Forfeitures will be used no later than 12 months following the close of the plan year in which the forfeitures were incurred under plan terms.

(c) *Transition rule for forfeitures incurred during plan years beginning before January 1, 2024.* For purposes of paragraph (b)(2) of this section, forfeitures incurred during any plan year that begins before January 1, 2024, will be treated as having been incurred in the first plan year that begins on or after January 1, 2024.

(d) *Applicability date.* This section applies for plan years beginning on or after January 1, 2024.

**Melanie R. Krause,**

*Acting Deputy Commissioner for Services and Enforcement.*

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